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In the Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
Petitioner,

v.

SIGMON COAL COMPANY, INC., and
JERICOL MINING, INC.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* USX CORPORATION AND U.S. STEEL MINING COMPANY, LLC IN SUPPORT OF JERICOL

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Fourth Circuit correctly held that, given the plain language of the statute, a signatory operator's successors in interest are not related persons under Section 9701(c)(2)(A) of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §9701(c)(2)(A), and, therefore, cannot be assigned financial responsibility for a defunct signatory operator's retired miners whom they never employed?

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STATEMENT OF INTEREST[1]

USX Corporation, by and through its wholly owned subsidiary, U.S. Steel Mining Company, LLC (herein collectively "USX"), is a major domestic coal producer and a "signatory operator" under the provisions of the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. § 9701 *et seq.* (herein the "Coal Act"). Although USX is also the nation's largest steel producer, it was one of the largest domestic coal producers during the period after World War II. USX was one of the founders of the Bituminous Coal Operators' Association, a multiemployer group that, for over half a century negotiated the series of National Bituminous Coal Wage Agreements ("NBCWAs") that established various UMWA trust funds.

USX is representative of the large coal producing companies that have borne the burden of financing retiree medical benefits for their own retirees and the retirees of the entire coal industry. Prior to the enactment of the Coal Act, USX steadfastly met its obligations to fund retiree health benefits by contributing to the various UMWA trust funds and maintaining an Individual Employer Plan for its own post-1978 retirees. Since the enactment of the Coal Act, USX has been assigned financial responsibility for over 6,000 retired miners and their dependents and has always met its premium

[1] Each of the parties has consented to the filing of this brief. A copy of the letter of consent from each party has been filed with the Clerk of this Court in accordance with Rule 37.3. No persons other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief, and the brief was not authored in whole or in part by counsel for a party.

obligations to the Combined Fund (approximately $15.0 million per year).

This case presents the straightforward question of whether a signatory operator who buys the assets of a coal mine can be held liable under the Coal Act for a defunct seller's retired miners (and their dependents), even though the only connection between the buyer and the retired miners is that, at one time or another, the miners worked for the selling signatory operator at one of possibly several mines. The United States Court of Appeals for the Fourth Circuit found no basis for liability since the Coal Act plainly addresses "successor in interest" and "successor" liability in several instances, but yet contains no provision for assignment of responsibility to a signatory operator's "successors in interest," let alone assignment of responsibility to a signatory operator's "successors." This is an issue of considerable significance to the mining industry because, as the Combined Fund has itself observed, transactions of this type "occur on a routine basis in the coal industry." *See Brief of the Trustees of the UMWA Combined Benefit Fund as Amici Curiae In Support of Petitioner* (herein *"Combined Fund's Brief"*) at 14.

Like its fellow amicus, the UMWA Combined Benefit Fund (herein the "Combined Fund"), USX has a strong interest in having the base of contributing employers under the Coal Act remain as broad as is provided for by the statute. *Combined Fund's Brief* at 2. Indeed, under the Coal Act, coal producers like USX may bear financial responsibility for the payment of additional premiums for "orphan" miners who are not assigned to responsible operators. Unlike the Combined Fund, however, USX also has a strong interest in having the Coal Act enforced in accordance with its terms and having miners assigned only to operators for whom they

worked (or to persons related to such operators as provided specifically by the Coal Act). Indeed, given USX's extensive history of buying and selling coal mines, USX would have opposed the Coal Act if it had been written so as to impose liability on pre-enactment successors or successors in interest to signatory operators.

Like all large coal companies, USX has periodically both purchased and sold coal mines in the regular course of its business. These purchases and sales have been bona fide, arms length asset transactions with unrelated third parties. None of these sales were undertaken for the purpose of avoiding benefit liabilities, and the purchased mines were subsequently operated under the applicable NBCWAs. Indeed, USX's purchases and sales have involved many of the nation's large coal producers. *See generally Carbon Fuel Co. v. USX Corporation*, 891 F. Supp. 1186 (S.D. W. Va. 1995), *aff'd*, 100 F.3d 1124 (4th Cir. 1996).

In 1970, USX purchased a coal mine from Crystal Block Coal & Coke Company ("Crystal Block") and operated it in accordance with the terms of the 1968 NBCWA (and successor NBCWAs). In 1982, USX sold the mine to Old Ben Coal Company and, by agreement, Old Ben Coal Company assumed the NBCWA applicable to the mine. Old Ben Coal Company has continued to operate the mine ever since.

Notwithstanding the bona fide, straightforward transaction by which USX bought, and then sold, the assets of the former Crystal Block mine, the Commissioner of Social Security ("Commissioner") assigned several hundred retired miners (and their dependents) who had worked for Crystal Block (generally in mines other than the mine USX

purchased) to USX under the Coal Act.[2] Moreover, SSA made these assignments to USX despite the fact that there is not, nor has there ever been, any legal, corporate or organizational connection or relationship between USX and Crystal Block (other than the sale and purchase of the assets of a single coal mine); despite the fact that most of the retired miners worked for Crystal Block at one of its three other mines; despite the fact that Old Ben Coal Company continues to own and to operate the mine in question; and despite the fact there are other operators who actually employed these miners and logically should be considered more responsible for their health benefits than USX.[3]

USX believes the Court should be informed of the vast array of inequities that likely induced Congress not to make pre-enactment successors or successors in interest to signatory operators related persons. These inequities are vividly illustrated by the Commissioner's assignments to USX of all of the retired miners who had worked for an unrelated signatory operator that sold USX one of its four mines, which mine USX later sold to another operator who still owns it.

---

[2] USX has challenged the validity of the Crystal Block assignments (as well as other assignments) in federal litigation captioned *USX Corporation and U.S. Steel Mining Company, LLC v. Massanari*, Civil Action No. 99-1058 (W.D. Pa.).

[3] In addition, it is worth noting that these miners (and their dependents) could not have been assigned directly to Crystal Block under this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 120 (2000), inasmuch as Crystal Block is a "super reach back company" that never signed the 1974 NBCWA or any successor agreement thereto.

STATEMENT OF THE CASE

This case involves the Commissioner's efforts to apply the Coal Act so as to (1) permit the assignment of a defunct signatory operator's retired miners to the operator's successors in interest, and (2) equate the statutory term "successors in interest" with the term "successors," even though the former term is narrowly defined under the Internal Revenue Code (of which the Coal Act is a part) and the latter term is broadly defined through the federal labor law. Specifically, this case presents the question of whether Jericol Mining Company ("Jericol") (and ultimately Sigmon Coal Company, as a related person to Jericol) is responsible for some eighty-six miners and beneficiaries who worked for the Shackleford Coal Company ("Shackleford"), a Kentucky company unrelated to Jericol or Sigmon.

The circumstances surrounding the Jericol assignments at issue are quite similar to the Crystal Block miners who were assigned to USX. In 1973, Shackleford sold its coal mine to Irdell Mining Company, which was subsequently named Jericol Mining Company. The sale was a bona fide, arms length transaction between two unrelated parties and there is no allegation or evidence that the transaction was motivated by any desire to avoid benefit liabilities. In accordance with the terms of the asset sales agreement, Jericol assumed the applicable NBCWA and operated the mine in accordance with the provisions of that labor agreement, including the obligation to make appropriate contributions to the UMWA Benefit Plans. Pet. App. 8a-10a, 68a-69a; R. 34-37, 211-212, 217.

In a series of decisions, the Commissioner assigned financial responsibility to Jericol for 86 retired miners (and their dependents) who had worked for Shackleford. The

purported basis for the assignments of these unrelated retired miners to Jericol was the Commissioner's assertion that the Coal Act permitted him to assign miners of a defunct signatory operator to its related persons, including a defunct signatory operator's successors in interest. In so doing, however, the Commissioner ignored the plain language of the Coal Act and interpreted it in such a way that it imposed substantial additional financial responsibility on an operator who had never employed or otherwise benefited from the retired miners it was now forced to pay for.

SUMMARY OF THE ARGUMENT

The plain language of the Coal Act controls the outcome of this case. Under a plain meaning interpretation, Section 9701(c)(2)(A) does not permit the Commissioner to treat a signatory operator's successors in interest as related persons, or to treat mere asset purchasers as successors in interest. This plain meaning interpretation is corroborated by several rules of construction, including the rule that when Congress uses language in one section but omits it from another, the omission should be viewed as intentional, and the rule against rendering any provision mere surplusage.

Moreover, a plain meaning interpretation of Section 9701(c)(2)(A) does not frustrate the Coal Act's purpose. The Coal Act was intended to remedy the UMWA trust funds' financial difficulties by imposing liability on those who benefited from the retired miners' services. Purchasers (such as USX) neither caused the problems the trust funds experienced, nor benefited in any way from the services of a seller's retired miners. Indeed, USX continuously operated under NBCWAs and never "dumped" any retiree obligations on any other operators. Consequently, the Coal Act's

purpose is not served in the least by making asset purchasers liable for a seller's retired miners.

Further, there is no fundamental inconsistency between imposing liability on a related person's successors in interest, but not a signatory operator's successors in interest. The former is part of Congress' overall scheme for preserving Coal Act liability on a post-enactment basis, whereas the latter presents very difficult questions of pre-enactment successor liability that Congress quite clearly chose to avoid.

As the USX situation vividly illustrates, trying to impose pre-enactment successor liability on operators in an industry where mines have been owned by multiple parties over several decades raises a host of difficult questions and issues of fundamental fairness. For example, why should an asset purchaser who paid for the assets it received be held responsible for retired miners it never employed, much less for retired miners who worked at a seller's other mines? Why should an asset purchaser be liable for a seller's retired miners if it subsequently sold those assets to another operator? If the second purchaser goes out of business, why should a third purchaser be responsible for the first and the second seller's retired miners? Why should other operators who actually employed a retired miner be dropped from consideration for possible assignment in favor of successive purchasers who never employed the retired miners or benefited from their services?

Congress' careful and limited use of the successor in interest language quite clearly resulted from its desire to avoid these and other difficult questions that arise when trying to make a signatory operator's successors in interest related persons. Indeed, given the extensive history of coal mine sales in this industry, the implausibility that Congress

inadvertently failed to address this important issue, or left these difficult questions to the discretion of an agency that has no particular expertise with respect to such issues or the coal industry, mandates a rejection of the Commissioner's position in this case.

ARGUMENT

A. The plain language of Section 9701(c)(2)(A) and the rules of statutory construction compel a finding that Congress did not intend to make the successors in interest of signatory operators related persons, or to make mere asset purchasers successors in interest.

1. Plain Meaning

"The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993). Thus, courts must begin with the presumption that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

The Commissioner's arguments notwithstanding, there can be little doubt that the plain language of Section 9701(c)(2)(A) of the Coal Act does not extend related person status to the successors in interest of signatory operators. Section 9701(c)(2)(A) provides as follows:

> Related persons. (A) In general. A person shall be considered to be a related person to a signatory operator if that person is --

> (i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

The Commissioner's assertion that a signatory operator is a "person described in clauses (i), (ii), or (iii)" is untenable.

Section 9701(c)(2)(A) identifies persons who are related to signatory operators. As such, it hardly can be viewed as including signatory operators within the class of persons who are related to signatory operators. Indeed, that would be a strange way of saying that successors in interest of signatory operators are related persons. Thus, the plain meaning of the language in Section 9701(c)(2)(A) does not make the successors in interest of signatory operators related persons.

Moreover, the Commissioner is not only seeking to read Section 9701(c)(2)(A) in a strange fashion, he is seeking to engraft an untenable meaning on the term "successor in interest." The Commissioner assumes that the terms "successor in interest" and "successor" are synonymous, and then uses a labor law successor standard to define the terms. Nevertheless, the terms are not synonymous, and when properly defined, the term "successor in interest" has no application to an asset purchaser.

Three Courts have observed that, because the Coal Act is part of the Internal Revenue Code, the phrase "successor in interest" should mean the same under the Coal Act as it does in Treasury Reg. Section 1.1503-2(c)(12) (which deals with a tax free exchange in which the acquiring corporation succeeds to the tax attributes of the selling corporation in a transaction subject to IRS Code Section 381). *Holland v. New Era Coal Company*, 179 F.3d 397, 402-3 (6th Cir. 1999); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* 201 B.R. 163, 171 (S.D. W. Va. 1996), *aff'd on other grounds*, 99 F.3d 575 (4th Cir. 1996); *In re Lady H Coal Co., Inc.*, 199 B.R. 595 (S.D.W.Va. 1996). In *New Era*, the Sixth Circuit described the types of transactions that satisfy the requirements of Section 381 as follows:

> Section 381 applies to transfer of assets (I.R.C. § 368(a)(1)(D)), liquidations of 80% owned subsidiaries (I.R.C. § 332), statutory mergers and consolidations (I.R.C. § 368(a)(1)(A)), nominal changes in corporate organization (I.R.C. § 368(a)(1)(F)), exchange of assets for voting stock (I.R.C. § 368(a)(1)(C)), transfer of substantially all assets between companies under common control, transfers of assets for stock of [an] acquiring corporation [and] related corporations in a bankruptcy reorganization (IRC § 368(a)(1)(G)).

179 F.3d at 401-2, fn. 1.[4]

Accordingly, to be a "successor in interest" for purposes of the Coal Act, one must be more than a labor law successor - one must have acquired the predecessor's assets or stock in a transaction qualifying under Section 381 of the Internal Revenue Code. Therefore, even if Section 9701(c)(2)(A) of the Coal Act is interpreted to encompass the successors in interest to signatory operators, that would not make one who simply purchased the assets of a coal mine a successor in interest.

In short, the Commissioner's position in this case ignores the plain meaning of the language Congress used to reflect its intent in Section 9701(c)(2)(A), which language plainly does not make a signatory operator's successor in interest a related person, and does not make an asset purchaser a successor in interest.

2. Intentional Exclusion

"Where Congress includes particular language in one section, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in its disparate inclusion or exclusion." *Duncan*

[4] Transfers under Section 368(a)(1)(D) are ones involving a transfer of assets from one corporation to another where one of the stockholders in the first corporation is or becomes the controlling stockholder in the second.

v. Walker, 121 S. Ct. 2120, 2125 (2001) *quoting Russello v. United States*, 464 U.S. 16, 23 (1983). Here, Congress addressed the rights and obligations of "successors" in several locations in addition to Section 9701(c)(2)(A), including Subchapter B, which concerns the Combined Fund, and Subchapter C, which concerns Individual Employer Plans ("IEPs") and the United Mine Workers of America 1992 Benefit Plan ("1992 Plan").

The successorship provision concerning the Combined Fund - Section 9706(b)(2) - states that "if a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary ... to such successor ... [but] the assigned operator transferring such assignment ... shall remain the guarantor of the benefits ...." Of the two successorship provisions involving IEPs and the 1992 Plan, one – Section 9711(g)(2) - is nearly identical to Section 9706(b)(2). The other – Section 9711(g)(1) - provides that, for purposes of Subchapter C, "[t]he term 'last signatory operator' shall include a successor in interest of such operator."

By expressly addressing successorship in Sections 9701(c)(2)(A), 9706(b)(2), and 9711(g)(1) and (2), there can be no doubt that Congress was aware of the concept. Therefore, Congress' use of language imposing liability on certain successors and certain successors in interest, but not others, must be viewed as intentional under *Duncan* and *Russello*.

Indeed, this point in underscored by the Court's recent analysis of a similar issue in *Duncan*. There, the Court sought to decide whether a federal habeas corpus petition was an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2). After

observing that, in other places within the same statute, Congress used the words "State" and "Federal" to denote state and federal proceedings, the Court held that the absence of a reference to "Federal" in Section 2244(d)(2) demonstrated Congress' intent to limit that provision to state proceedings:

> We find no likely explanation for Congress' omission of the word "Federal" in § 2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period. It would be anomalous, to say the least, for Congress to usher in federal review under the generic rubric of "other collateral review" in a statutory provision that refers expressly to "State" review, while denominating expressly both "State" and "Federal" proceedings in other parts of the same statute.

Duncan, 121 S. Ct. In like manner, there is no good explanation for Congress' omission of a specific reference to the "successors" or "successors in interest" to signatory operators in Section 9701(c)(2)(A), particularly given the specific reference to the successor in interest to last signatory operators in Section 9711(g)(1), and the reference to successors in Sections 9706(b)(2) and 9711(g)(2), other than that Congress did not intend to make signatory operators' successors or successors in interest related persons.

3. Giving Effect to All Terms

This Court's decisions "consistently have expressed 'deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868,

877 (1991). *See also Duncan*, 121 S. Ct. at 2125 *citing Williams v. Taylor*, 520 U.S. 362 (2000), for the proposition that this is a "cardinal principle of statutory construction." Thus, it is the Court's "duty 'to give effect, if possible, to every clause and word of a statute' ... rather than emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Here, construing Section 9701(c)(2)(A) as making the successors in interest of signatory operators related persons and violates this rule.

As mentioned above, Section 9711(g)(1) states that, for purposes of Subchapter C, "[t]he term 'last signatory operator' shall include a successor in interest of such operator." If the successor in interest of a signatory operator already was a "related person," however, then Section 9711(g)(1) would be surplusage. This is because Sections 9711(c) and 9712(d)(4) separately extend a signatory operator's Subchapter C obligations to its "related persons."[5]

On the other hand, if the term "related person" does not include a signatory operator's successors in interest, then Section 9711(g)(1) makes sense as imposing a limited form of liability for a last signatory operator's successors in interest.

[5] Section 9711(c) provides that "[e]ach related person of a signatory to which subsection (a) or (b) [relating to IEP obligations] applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b)." Section 9712(d)(4) provides that "[a] 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid under this Section."

4. Not Inferring Additional Remedies

"A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 94, n. 30 (1981). Here, the Coal Act explicitly sets forth a detailed remedial scheme for imposing liability on signatory operators and other persons. Under these circumstances, expanding Section 9701(c)(2)(A) to include the successors or successors in interest of signatory operators is unwarranted, and amounts to an impermissible rewriting of the statute. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 463 (1987) ("Respondent's position depends upon the addition of words to a statutory provision which is complete on its face. Adoption of their view would require amendment rather than construction of the statute, and it must be rejected here.").

In sum, the language used, as well as several well-settled rules of statutory construction, demonstrate that Congress meant exactly what it said in Section 9701(c)(2)(A).

B. To the extent the Coal Act's purpose is relevant, construing Section 9701(c)(2)(A) in accordance with its plain meaning furthers that purpose.

A court must be wary of construing a statute based on its purported purpose:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the

> dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of Congressional intent.

Board of Governors of the Federal Reserve System v. Dimensions Financial Corporation, 474 U.S. 361, 373-74 (1986). For this reason, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

Indeed, it is one thing to use a statute's purpose to find present language that is essential to the operation of a federal scheme. It is quite another to find, as the Commissioner asks this Court to do, that interpreting Section 9701(c)(2)(A) as including the successors in interest of signatory operators is necessary to more effectively achieve the Coal Act's purpose:

> Finally, the [Government] retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes [citation omitted]. That principle may be invoked, in the case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme;

> but it does not add features that will achieve the statutory "purposes" more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two.

Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Company, 514 U.S. 122, 135 - 36 (1995).

Given the plain language of Section 9701(c)(2)(A) and the consistency with which that plain meaning interpretation fits with several rules of construction, there simply is no reason to consider the Coal Act's purpose. Nevertheless, to the extent the Coal Act's purpose is material, the Commissioner's interpretation of Section 9701(c)(2)(A) does not further the Coal Act's purpose and, if anything, is contrary to that purpose.

Congress enacted the Coal Act to remedy the threat to the financial stability of the coal industry trust funds that had been caused, in large measure, by coal operators withdrawing from the coverage of the NBCWAs and operating union free or by going out of business altogether, and thereby leaving the remaining signatories to absorb the increasing cost of their retirees. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 510 (1998). Thus, Congress imposed liability on those who had employed the retired miners and thereby benefited from their services, as well as those who, because of common ownership and control with the employer, also financially benefited from the retired miners' services. *Id*, 524 U.S. at 514.

That said, imposing related person liability on a signatory operator's successors or successors in interest does not help to achieve the objective of holding liable those who caused the trust funds' financial problems and benefited from the retired miners' services. First, notwithstanding the Commissioner's unsupported statements to the contrary, Congress did not have any reason to believe that sales from one signatory to another caused or contributed to the trust funds' financial instability. Indeed, USX continued to contribute to the UMWA trust funds and provide retiree medical benefits directly to its retired miners (through its Individual Employer Plan) long after it purchased the Crystal Block mine. Consequently, purchasers in these types of situations could not reasonably have been considered to have caused the financial instability of the trust funds, much less to have "dumped" any legitimate retiree medical benefit obligations on any other operators.

Second, the objective of imposing liability on those who benefited from the miners' services is not furthered in the least by imposing related person liability on a signatory operator's labor law successors. Neither Jericol nor USX ever had any employment relationship with the miners at issue. Consequently, Jericol and USX are being subjected to the very evil the Coal Act sought to eliminate – the "dumping" of retiree medical benefit obligations on responsible operators who never employed or benefited from the retired miners' services.

Third, the fact that Jericol and USX purchased assets from the operators who had employed the subject retired miners is too thin a reed upon which Congress reasonably could have intended to impose liability. As the Court below astutely observed, "[t]o the extent that the retired Shackleford miners conferred a benefit on Jericol, such as improving the

physical assets of the operation or advancing the goodwill of the company through their hard work, Jericol presumably paid fair market value for these benefits under the terms of the asset purchase." *Sigmon Coal Company, Incorporated v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000). That point is even more compelling in USX's case, where most of the assigned retired miners never even worked at the mine that USX purchased.

In sum, even if one can rely on the Coal Act's purpose to resolve the statutory construction issue presented here, the fact of the matter is that the Coal Act's purpose is not furthered by reading Section 9701(c)(2)(A) as encompassing the successors or successors in interest of signatory operators. Sales such as those at issue here did not cause the problems that led to the Coal Act's passage, and purchasers such as USX, who did not evade or avoid any retiree benefit obligations, cannot reasonably be viewed as Congressional targets of lifetime responsibility for a defunct seller's retired miners.

C. The fact that Congress chose to impose related person liability on the successors in interest of related persons, but not the successors in interest of signatory operators, was a rational legislative decision.

A core part of the Commissioner's argument is that it makes no sense to impose liability on the successors in interest of the designated related persons, and for certain purposes involving the 1992 Benefit Plan and Individual Employer Plans, the successors in interest of last signatory operators, but not on the successors in interest of signatory operators. The Commissioner, however, perceives an inconsistency that does

not exist, and Congress had good reasons for the choices it made.

1. Imposing liability on the successors in interest of the designated related persons in Section 9701(c)(2)(A) makes sense as part of Congress' overall scheme for addressing post-enactment attempts to avoid liability.

As a preliminary matter, the reference in Section 9701(c)(2)(A) to a related person's successors in interest is one of three provisions that seek to preserve post-enactment liability. Section 9701(c)(2)(B) provides that the relationships described in clauses (i) – (iii) of Section 9701(c)(2)(A) shall be determined as of the earlier of July 20, 1992, or the date the signatory operator went out of business; however, that Section does not address when successors in interest to the designated related persons should be determined. Therefore, one way to interpret this successorship provision is to read it as having been intended to insure that those succeeding to a related person's tax attributes after the Coal Act's enactment would remain liable for the related person's obligations.[6]

Indeed, such an interpretation of Section 9701(c)(2)(A) reasonably fits with two other provisions Congress enacted to preserve Coal Act liability in the event of post-enactment sales by signatory operators. For example, as mentioned above, Sections 9706(b)(2) and 9711(g)(2) provide that post-enactment successors may assume a signatory operator's

[6] Despite the extensive amount of litigation concerning the liability of a signatory operator's successors in interest, undersigned counsel is not aware of any instances in which liability has been imposed on the successor in interest of a related person for periods prior to the Coal Act's enactment (or afterwards for that matter).

obligations under the Coal Act, but that the signatory operator and its related persons shall remain guarantors of those obligations. Thus, taken together, Sections 9706(b)(2), 9711(g)(2), and the successor in interest language in Section 9701(c)(2)(A), provide a complete scheme for preserving Coal Act liability in the context of post-enactment transactions.

2. The difficulties and unfairness of making a pre-enactment signatory operator's successors in interest related persons easily explain why Congress did not make such successors in interest related persons.

The answer to why Congress confined pre-enactment liability for retired miners in the Combined Benefit Fund to signatory operators and the designated related persons quite likely lies in the difficulties and unfairness of imposing such liability on the successors or successors in interest of signatory operators. For example, imposing liability on a pre-enactment purchaser of a signatory operator's assets raises numerous unanswered questions and presents an array of fundamental fairness issues, including the following:

1. Who among a mine's various owners should receive a defunct seller's assignments? For example, as between USX, the second owner of Crystal Block's mine, and Old Ben Coal Company, its third and current owner, who should be responsible for Crystal Block's retired miners and why? The Commissioner arbitrarily determined that the liability should go to the first purchaser and then proceed down the purchaser trail until an active purchaser (or active related person) can be found. Pet. App. at 87a; Jt. App. at 103. Nevertheless, what benefit did USX receive that Old Ben Coal Company did not also receive? Indeed, given the long and varied ownership history of many mines prior to the Coal

Act's enactment, choosing an appropriate purchaser upon whom to foist liability for a defunct seller's retired miners is difficult, to say the least.

2. Why should an operator that purchased one of a seller's several mines be responsible for all of the seller's retired miners? For example, why should USX be responsible for miners who worked at Crystal Block mines that USX did not purchase? Indeed, if USX was defunct, why should Old Ben Coal Company receive all of the Crystal Block assignments, as well as all of USX's thousands of assignments, simply because Old Ben Coal Company purchased the Crystal Block mine from USX in 1981? In short, there is no rational connection between the purchase of a single mine and responsibility for hundreds if not thousands of miners who worked at the seller's other mines, much less those who worked at the mines of a prior seller.

3. Why should an asset purchaser be considered a last resort? In other words, if the purchaser is a related person under Section 9701(c)(2)(A), as the Commissioner submits, then what basis does the Commissioner have for arbitrarily creating a priority among the respective related persons? Obviously, assigning retired miners to a specifically designated related person ahead of a purchaser makes sense from a fairness perspective; however, from a statutory construction perspective, nothing in the statute authorizes such a priority. Consequently, the absence of such a priority suggests that none was intended - which hardly seems fair - or, more likely, that Congress did not address this subject because it did not intend to make asset purchasers related persons.

4. Assuming the first purchaser of a mine is out of business, does responsibility for the seller's retired miners

then shift to the next purchaser of that mine, or does it first proceed to the initial purchaser's own related persons? For example, if USX was out of business, would the Crystal Block miners go to one of USX's related persons, or would they go to Old Ben Coal Company? Logically, under the Commissioner's view of Section 9701(c)(2)(A), if USX is liable as a related person to Crystal Block, then all of USX's related persons are equally liable for the Crystal Block miners ahead of Old Ben Coal Company; however, the connection between USX's related persons and the Crystal Block miners is so attenuated that it is hard to believe Congress intended for USX's related persons to be responsible ahead of the mine's subsequent owner(s).

5. Why should other signatory operators who actually employed Crystal Block's retired miners be ignored as possible assignees? Once the Commissioner determines that a particular signatory operator should receive an assignment, he proceeds to assign the miner to the signatory operator or any of its related persons who are still in business (including their purchasers). By doing so, the Commissioner overlooks the possible assignment of such miners to other operators who actually employed them and still may be in business.

For example, if Crystal Block employed a miner from 1950 to 1960, but Signatory Operator A, another pre-1978 signatory that is still in business, later employed the miner from 1960 to 1969, the Commissioner would still assign the miner to Crystal Block, and then to USX, as Crystal Block's putative successor in interest. As a result, USX would be assigned responsibility for a miner it never employed, and Signatory Operator A, who actually employed the miner for a substantial period of time, would be let off the hook.

Congress was aware of the extensive history of coal mine sales over the four decades preceding the Coal Act's passage. Indeed, Congress must have been aware that three Circuit Courts had already resolved contentious disputes concerning mine sales that turned on the meaning of the words used in the NBCWA's successorship clause. *See United Mine Workers of America International Union v. U.S. Steel Mining, Inc.*, 895 F.2d 698 (10th Cir. 1990); *In re Chateaugay Corporation*, 891 F.2d 1034 (2d Cir. 1989); *District 17, United Mine Workers of America v. Allied Corporation*, 765 F.2d 412 (4th Cir. 1985), *cert. denied*, 473 U.S. 905 (1985). Therefore, given this historical context, if Congress had intended to impose liability on pre-enactment mine purchasers, it most certainly would have done so with carefully chosen words that clearly addressed at least some of these difficult issues. *See Whitman v. American Trucking Associations, Inc.*, 121 S. Ct. 903, 910 (2001)("The implausibility of Congress' leaving a highly significant issue unaddressed (and thus delegating its resolution to the administrative agency) is assuredly one of the factors to be considered in determining whether there is ambiguity."), *quoting Christensen v. Harris County*, 529 U.S. 576, 590 (2000)(Scalia, J., concurring in part and concurring in judgment).

The implausibility of Congress having mistakenly overlooked these difficult and important successorship issues, or left them to the agency to resolve on an ad hoc basis, weighs heavily in favor of finding that Congress intentionally omitted successors in interest of signatory operators from the definition of related persons. This is particularly true given that the Social Security Administration has no particular expertise in dealing with successorship issues, the coal industry, or the singularly complex history of successorship disputes in the coal industry. *See, e.g., Board of County Commissioners v. Isaac*, 18 F.3d 1492,1497 (10th Cir.

1994)("An agency's interpretation of its own regulation is not entitled to great deference if it is based on general common law principles rather than the agency's expertise...."); *Bambidele v. Immigration & Naturalization Service*, 99 F.3d 557, 561 (3d Cir. 1996)(little deference is owed when the dispute involves a legal issue that is not within the agency's particular expertise, such as the interpretation of a statute of limitations).

Finally, the fact that Congress extended liability to the successors in interest of last signatory operators under Section 9711(g)(1) for purposes of Individual Employer Plans and the UMWA 1992 Benefit Plan, but not to the successors in interest of signatory operators generally, also makes sense. Individual Employer Plans went into effect with the NBCWA of 1978. Thereafter, operators who sold their mines had to require the purchasers to assume their obligations under the NBCWA, including their obligations under an Individual Employer Plan. *See Allied Corporation, supra*. Thus, unlike the operators who purchased mines before 1978, and had no contact with the seller's retirees, purchasers from 1978 on generally had direct contact with the seller's retirees because they had to provide the seller's retirees with medical benefits. Under these circumstances, making a last signatory operator's successors in interest liable for the defunct operator's retirees is based on a legitimate connection between the retirees and the successor in interest, and did not pose the vast array of difficult problems and issues of fairness that come with trying to make a pre-enactment signatory operator's purchaser a related person.

In sum, Congress' decisions with respect to what it did and what it did not do with successors or successors in interest, reflect an awareness of the difficulties of obtaining a consensus on the legislation, and a determination not to delve

into the complicated thicket of trying to impose liability on pre-enactment successors or successors in interest. Therefore, the Court is bound by the plain language Congress used to reflect the choices it made, one of which was to limit related person liability to the specific entities identified in Section 9701(c)(2)(A)(i) – (iii), and their successors in interest.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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